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NO. 87-277

in the

Supreme Court

of the

United States

OCTOBER TERM 1987

STATE OF FLORIDA,

Petitioner,

vs.

SETH EBER, ROBERT RIZZIERI, CHARLES DELMONICO, SHELDON SPECTOR, and BURTON WOLCOFF,

Respondents.

On Petition For A Writ Of Certiorari To The Florida Third District Court Of Appeal

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether certiorari is appropriate where the State appellate court does not decide a federal question but, instead, merely approves, in general terms, a trial judge's decision on independent State law grounds, only one of which is questioned by Petitioner?

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion below is reported as *State v. Eber*, 502 So.2d 32 (Fla. 3d DCA), *rev. denied*, ____ So.2d ____ (Fla. 1987), and is reproduced in Petitioner's Appendix at A1-A7.

JURISDICTION

The judgment of the Florida appellate court was entered on January 20, 1987. That court denied rehearing on February 25, 1987. The Florida Supreme Court denied discretionary review on June 19, 1987 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on August 14, 1987. Petitioner has invoked this Court's jurisdiction under 28 U.S.C. §1257(3) and Supreme Court Rule 17.1(c).

STATEMENT OF THE CASE

On February 2, 1984, the State of Florida charged, in separate charging documents, all Respondents with violations of the Florida RICO, extortion, kidnapping, theft, and dealing in stolen property statutes. The cases were consolidated for purposes of pretrial proceedings. The Respondents jointly filed a motion to suppress evidence derived from electronic interceptions. That motion raised a number of independent grounds for suppression of the evidence, including the absence of probable cause under Florida's Security of Communications Act, the inclusion of material misrepresentations and omissions in the supporting affidavit, the lack of necessity, and the failure to exhaust traditional investigative techniques.[1]

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[1]Petitioner incorrectly states in its Brief on Jurisdiction that "[t]he primary ground for the motion was the alleged errors and omissions contained in the affidavits . . ." (Pet. Brief at 6). The motion to suppress raised a number of equally compelling claims, four of which were found by the trial court to warrant suppression. The appellate court affirmed the trial court's decision.

The suppression issues were presented during a three-day evidentiary hearing, following which the trial judge issued an order suppressing the evidence gathered from electronic surveillance, including all evidence obtained from telephone interceptions and a body bug. The suppression order included findings of fact and conclusions of law, all based on the application of substantive Florida law and the Florida wiretap statute. The order concluded that suppression was mandatory for four independent reasons: absence of necessity for the electronic interception, a lack of exhaustion of traditional investigative techniques, the inclusion of material misrepresentations and omissions in the supporting affidavit, and a lack of probable cause.

The State of Florida appealed the suppression order. The Florida Third District Court of Appeal affirmed the order granting suppression of the evidence as to all Respondents except San Roman.[2] *State v. Eber*, 502 So.2d 32 (Fla. 3d DCA 1987). The Third District opinion concluded that the "trial court's order granting the defendants' consolidated motions to suppress, being amply supported by substantial competent evidence and controlling case law, is affirmed as to all defendants except Richard San Roman." 502 So.2d at 33. The court concluded that San Roman was not an aggrieved person to the electronic surveillance. Other than the "standing" question affecting San Roman, the Third District Court of Appeal did not isolate any legal issues, approve any specific analysis of the trial court, or apply any of the legal authority cited by the trial judge.

The State of Florida applied to the Florida Supreme

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[2]San Roman is not a party to this certiorari proceeding.

Court for a grant of discretionary review, claiming that the appellate decision conflicted with a prior decision of the Florida Supreme Court with regard to the single issue of the inclusion of material misrepresentations and omissions. The Florida Supreme Court denied discretionary review on June 19, 1987.

ARGUMENT

Petitioner contends that the decision of the Florida Third District Court of Appeal conflicts with the decision of this court in *Franks v. Delaware*, 438 U.S. 154 (1978). It is important to note at the outset, however, that Petitioner does not suggest that the Florida Third District directly addressed this Court's *Franks* opinion or that it even discussed the application of *Franks* to the case under review. Instead, Petitioner claims only that the Third District must have ruled contrary to *Franks* because one of the underlying, independent grounds for the suppression order was the presence of material misrepresentations and omissions in the affidavit supporting the electronic interception warrants. Petitioner's argument is plainly meritless.

The certiorari petition essentially asks this Court to look behind the decision of the State appellate court and speculate as to the reasons for its ruling. That is not consistent with Supreme Court Rule 17.1(c), upon which Petitioner grounds its certiorari request. That Rule provides that the discretionary grant of certiorari should be evaluated in light of the following considerations:

> When a state court or a federal court of appeals has decided an important question of federal

> law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

In its opinion, the Florida appellate court did not even purport to discuss the federal rule cited by Petitioner, and the opinion certainly does not conflict with any decision of this Court. This is evidenced by the fact that the Third District reviewed a suppression order bottomed on four independent grounds. The appellate court affirmed suppression, and stated, in general terms that the trial court's ruling was "amply supported by substantial competent evidence and controlling case law. . ." 502 So.2d at 33. Three of the reasons for suppression relied upon by the trial court are not questioned by Petitioner and are impliedly conceded to be correct. Thus, its request that this Court predicate review on one issue which was not plainly decided by the state appellate court should be rejected.[3]

This jurisdictional consideration, moreover, is not satisfied when a state appellate court has an adequate nonfederal ground to support its decision. *See Michigan v. Long*, 463 U.S. 1032, 1042 (1983). That is precisely what has occurred in the present case. The Florida appellate court reviewed a state wiretap order which was authorized by a state judge under Florida's Security

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[3]Justice Brennan articulated these jurisdictional concerns in *State Court Decisions and the Supreme Court*, 31 Penn. Bar Assn. Q. 393, 399-400 (1960).

of Communications Act.[4] The trial judge applied Florida law in concluding that suppression was required. When the case was reviewed by the Third District, the case hinged on an application and interpretation of Florida law. Thus, since a review of the appellate court decision shows an independent and adequate state substantive ground, this Court should decline jurisdiction. *See, e.g., Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164-165 (1917).[5]

Petitioner's contention that this case raises a Fourth Amendment issue is not supported by the record of proceedings in the Florida courts, where the case involved an interpretation of state statutes—Florida's Security of Communications Act—and an application of state privacy interests. A fundamental rule of judicial restraint is that prior to reaching any constitutional

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[4]Chapter 933, Florida Statutes. State law can impose more rigid requirements than federal law. *See United States v. Domme*, 753 F.2d 950, 955 (11th Cir. 1985). In the case of Florida seizures occurring before January 4, 1983, Florida provided a higher standard of protection from governmental intrusion than that afforded by the United States Constitution. *State v. Lavazzoli*, 434 So.2d 321, 323 (Fla. 1983); *State v. Williams*, 443 So.2d 952 (Fla. 1983). The warrants in this case were issued in June, July and August of 1982, prior to the Florida Constitutional Amendment relied upon by Petitioner. This constitutional amendment was held to have only prospective application. *State v. Lavazzoli.*

[5]"If a state court's decision can rest on an independent decision involving state law, then regardless of the correctness of the state court's decision on an issue of federal law, the Supreme Court does not have jurisdiction, because the validity of the statute under the constitution of the United States is not 'drawn in question,' for purposes of 28 U.S.C. §1257(2)." *Beltran v. State of California*, 617 F.Supp. 948, 954 (S.D. Cal. 1985), citing to C. Wright & A. Miller, Federal Practice & Procedure, §§4019, 4029.

questions, courts should consider non-constitutional grounds for decision. "[I]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Jean v. Nelson*, 472 U.S. 846, 105 S.Ct. 2992, 2998 (1985); *Gulf Oil v. Bergance*, 452 U.S. 89, 99 (1981). Moreover, as recognized in *Int'l Longshoreman's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 106 S.Ct. 1904, 1910 (1986), this Court has no authority to review state determinations of purely state law, nor may it review federal issues that can have no affect on a state court's judgment.

This Court should not consider this case since jurisdiction is premised on a constitutional question raised by Petitioner where there is no reason to conclude that the state appellate court considered or reached that constitutional question. In this respect, Respondents take strong issue with Petitioner's unsupported and erroneous claim that "there can be no question that Federal Law, not State Law was applied." (Pet. Brief at 13). As the previous discussion illustrates, the real question is whether the appellate court had any reason to address the merits of Petitioner's argument. It is apparent that it did not.

Close scrutiny of Petitioner's argument reveals that the federal question asserted—conflict with *Franks v. Delaware*—is not a substantial one for which this Court's review is necessary or appropriate. First, Petitioner's tortured construction of the trial court's conclusion on the material misrepresentation issue overlooks that court's finding that the electronic interception affidavits

lacked probable cause.[6] (Pet. App. A31). That is precisely the analysis called for in *Franks*: to determine whether the affidavit, after excising the unquestionably false statements and omissions, independently establishes probable cause. 438 U.S. at 156-157, 98 S.Ct at 2676. The trial court carefully applied that rule, and made a specific finding, pursuant to the standard articulated in *Franks,* that the omissions and misstatements were material. The appellate court viewed the trial court order from that correct legal perspective. There is nothing in the appellate court decision which can be construed as rejecting the *Franks* standard. Thus, there is no basis for a claim of conflict.

Petitioner's conflict jurisdiction argument rests on a misinterpretation of the Third District opinion and a misunderstanding of this Court's jurisdiction. The trial court correctly concluded that suppression was required on the basis of four independent reasons: the wiretap was unnecessary, police did not exhaust available investigative methods, the affidavits as a whole lacked probable cause, and there were material misrepresentations and omissions. The appellate court merely affirmed the trial court order on the ground that it was "amply supported by substantial competent evidence and controlling case law." Therefore, resolution of the appeal did not rest solely on the material misrepresentation question so vigorously

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[6]Petitioner does not claim any error in the determination that material misrepresentations and omissions infected the supporting affidavit. This Court, moreover, should not review the factual findings of the lower tribunals. *See Miller v. Fenton*, 474 U.S. 104 (1985); *United States v. Doe*, 465 U.S. 605, 613-614 (1984).

pursued by Petitioner.[7] As these independent, unquestioned grounds are broad enough to support the decision of the appellate court, certiorari review would "amount to no more than an advisory opinion." *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). This court should decline jurisdiction.

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[7]The crux of Petitioner's argument is that the trial court cited the case of *Hudson v. State*, 368 So.2d 899 (Fla. 3d DCA 1979), in discussing the standard for evaluating misstatements and omissions. Notwithstanding the fact that the trial court cited *Hudson v. State* in its order, it still found that the misrepresentations and omissions were material and that the remainder of the affidavits did not establish probable cause, which is precisely what is required under *Franks*. Thus, the trial court's reference to *Hudson v. State* was irrelevant, because its decision did not turn on whether the misrepresentations were intentional, but rather on whether they were material.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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